

UNITED STATES MAGISTRATE JUDGE BRIAN A. TSUCHIDA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

3M COMPANY,

Plaintiff,

v.

AIME LLC, et al.,

Defendants.

CASE NO. 2:20-cv-01096-TL-BAT

PROTECTIVE ORDER

The parties were unable to agree on a stipulated protective order. Dkt. 48. Defendants sought entry of the standard order; plaintiff proposed revisions to add the category “Highly Confidential – Attorneys’ Eyes Only,” address how material thus categorized should be handled, and address electronically stored discovery material. Dkt. 48-1. The Court finds that plaintiff’s proposed Protective Order is better crafted to address the subject matter of this lawsuit. The Court therefore enters this Protective Order.

1. PURPOSES AND LIMITATIONS

Discovery in this action is likely to involve production of confidential, proprietary, or private information for which special protection may be warranted. The following Protective Order

1 is therefore entered. Plaintiff acknowledges that this order is consistent with LCR 26(c). It does
2 not confer blanket protection on all disclosures or responses to discovery, the protection it affords
3 from public disclosure and use extends only to the limited information or items that are entitled to
4 confidential treatment under the applicable legal principles, and it does not presumptively entitle
5 parties to file confidential information under seal.

6 2. “CONFIDENTIAL” AND “HIGHLY CONFIDENTIAL” MATERIAL

7
8 The parties may designate information as “Confidential” or as “Highly Confidential –
9 Attorneys’ Eyes Only” (the “Confidentiality Designation”).

10 2.1 “Confidential” or “CONFIDENTIAL” information is information that, if disclosed
11 or otherwise made available to others and/or the public, the Producing Party reasonably and in
12 good faith believes that such disclosure would contravene the Producing Party’s obligation of
13 confidentiality to a third party and/or will likely harm the Producing Party’s competitive position
14 concerning, inter alia: that Party’s business operations; business processes; business strategies;
15 confidential information regarding customers, dealers and distributors and/or other commercially
16 sensitive information that is not publicly known.

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18 2.2 “Highly Confidential – Attorneys’ Eyes Only” or “HIGHLY CONFIDENTIAL –
19 ATTORNEYS’ EYES ONLY” information is information that, if generally disclosed to the
20 opposing Party, the Producing Party reasonably and in good faith believes that such disclosure will
21 likely harm the Producing Party’s competitive position concerning, inter alia: trade secrets;
22 customer/supplier lists and other highly confidential information regarding customers, dealers and
23 distributors; non-public technical information; confidential financial information; manufacturing
24 and research information; confidential commercial information regarding the technology used to
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1 make and/or confirm the authenticity of the products at issue in the litigation; and/or other highly-
2 sensitive information that is not publicly known.

3 2.3 Information should not be designated as “Confidential” or as “Highly Confidential
4 – Attorneys’ Eyes Only” if it is or consists of publicly disclosed advertising materials; materials
5 that on their face show that they have been published to the general public; information that was
6 known to the recipient without obligation of confidentiality before the Producing Party disclosed
7 it; information that becomes known to the recipient by means not constituting a breach of this
8 Order or other obligations of confidentiality; and information obtained lawfully independently of
9 this litigation.
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11 3. SCOPE

12 The protections conferred by this Order cover not only confidential and highly confidential
13 material (as defined above), but also (1) any information copied or extracted from confidential
14 material; (2) all copies, excerpts, summaries, or compilations of confidential material; and (3) any
15 testimony, conversations, or presentations by parties or their counsel that might reveal confidential
16 material.
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18 However, the protections conferred by this Order do not cover information that is in the
19 public domain or becomes part of the public domain through trial or otherwise.

20 4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

21 4.1 Basic Principles. A receiving party may use confidential material that is disclosed
22 or produced by another party or by a non-party in connection with this case only for prosecuting,
23 defending, or attempting to settle this litigation. Confidential material may be disclosed only to the
24 categories of persons and under the conditions described in this Order. Confidential material must
25 be stored and maintained by a receiving party at a location and in a secure manner that ensures that
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1 access is limited to the persons authorized under this Order.4.2 Disclosure of

2 “CONFIDENTIAL” Information or Items. Unless otherwise ordered by the court or permitted in

3 writing by the designating party, a receiving party may disclose any confidential material only to:

4 (a) the receiving party’s counsel of record in this action, as well as employees
5 of counsel to whom it is reasonably necessary to disclose the information for this litigation;

6 (b) the officers, directors, and employees (including in house counsel) of the
7 receiving party to whom disclosure is reasonably necessary for this litigation, unless the parties
8 agree that a particular document or material produced is Highly Confidential - Attorneys’ Eyes
9 Only and is so designated;

10 (c) experts and consultants to whom disclosure is reasonably necessary for this
11 litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

12 (d) the court, court personnel, and court reporters and their staff;

13 (e) copy or imaging services retained by counsel to assist in the duplication of
14 confidential material, provided that counsel for the party retaining the copy or imaging service
15 instructs the service not to disclose any confidential material to third parties and to immediately
16 return all originals and copies of any confidential material;

17 (f) during their depositions, witnesses in the action to whom disclosure is
18 reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound”
19 (Exhibit A), unless otherwise agreed by the designating party or ordered by the court. Pages of
20 transcribed deposition testimony or exhibits to depositions that reveal confidential material must
21 be separately bound by the court reporter and may not be disclosed to anyone except as permitted
22 under this Order;
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1 (g) the author or recipient of a document containing the information or a
2 custodian or other person who otherwise possessed or knew the information.

3 (h) Any mediator(s), arbitrator(s), or special master(s) appointed by the Court
4 or agreed to by the Parties; and

5 4.3 Highly Confidential – Attorneys’ Eyes Only Information may only be disclosed to:

6 (a). Counsel of record (see 4.2(a))

7 (b) Outside Experts (see 4.2(c));

8 (c) Court reporters, stenographers and/or video recorders (see 4.2(d));

9 (d) The Court, its personnel and those persons designated by the Court to view
10 Highly Confidential Information;

11 (e) Any mediator(s), arbitrator(s), or special master(s) appointed by the Court
12 or agreed to by the Parties; and

13 (f) Any person who, based on the face of the Highly Confidential document, as
14 established through specific documentary or testimonial evidence or as agreed to by the Producing
15 Party, authored or previously received a copy of the document.

16 4.4 A Party may not disclose information designated by another Party as Confidential
17 and/or Highly Confidential – Attorneys’ Eyes Only to persons allowed to view such materials
18 under Sections 4.2(b), (c) and (g) and Sections 4.3(b) and (e) until that person has signed and
19 agreed to the provisions set forth in the “Acknowledgment and Agreement to Be Bound” (Exhibit
20 A).
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1 4.5 A Party who wishes to disclose information designated as Confidential or Highly
2 Confidential – Attorneys’ Eyes Only to a person not authorized by this Order to receive it must
3 first make a reasonable attempt to obtain the Producing Party’s permission. If the Party is unable
4 to obtain permission, it may move the Court to obtain permission.

5 4.6 A Party may disclose information designated as Confidential or Highly
6 Confidential – Attorneys’ Eyes Only to: (i) any employee or author of the Producing Party; (ii)
7 any person, no longer affiliated with the Producing Party, who authored the information in whole
8 or in part; and (iii) any person who lawfully received the information before this case was filed.

10 4.3 Filing Confidential Material. Before filing confidential material or discussing or
11 referencing such material in court filings, the filing party shall confer with the designating party,
12 in accordance with Local Civil Rule 5(g)(3)(A), to determine whether the designating party will
13 remove the confidential designation, whether the document can be redacted, or whether a motion
14 to seal or stipulation and proposed order is warranted. During the meet and confer process, the
15 designating party must identify the basis for sealing the specific confidential information at issue,
16 and the filing party shall include this basis in its motion to seal, along with any objection to sealing
17 the information at issue. Local Civil Rule 5(g) sets forth the procedures that must be followed and
18 the standards that will be applied when a party seeks permission from the court to file material
19 under seal. A party who seeks to maintain the confidentiality of its information must satisfy the
20 requirements of Local Civil Rule 5(g)(3)(B), even if it is not the party filing the motion to seal.
21 Failure to satisfy this requirement will result in the motion to seal being denied, in accordance with
22 the strong presumption of public access to the Court’s files.
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1 5. DESIGNATING PROTECTED MATERIAL

2 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each party
3 or non-party that designates information or items for protection under this Order must take care to
4 limit any such designation to specific material that qualifies under the appropriate standards. The
5 designating party must designate for protection only those parts of material, documents, items, or
6 oral or written communications that qualify, so that other portions of the material, documents,
7 items, or communications for which protection is not warranted are not swept unjustifiably within
8 the ambit of this Order.
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10 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
11 shown to be clearly unjustified or that have been made for an improper purpose (*e.g.*, to
12 unnecessarily encumber or delay the case development process or to impose unnecessary expenses
13 and burdens on other parties) expose the designating party to sanctions.

14 If it comes to a designating party's attention that information or items that it designated for
15 protection do not qualify for protection, the designating party must promptly notify all other parties
16 that it is withdrawing the mistaken designation.
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18 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order
19 (*see, e.g.*, second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,
20 disclosure or discovery material that qualifies for protection under this Order must be clearly so
21 designated before or when the material is disclosed or produced.
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23 (a) Information in documentary form: (*e.g.*, paper or electronic documents and
24 deposition exhibits, but excluding transcripts of depositions or other pretrial or trial proceedings),
25 the designating party must affix the word "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL –
26 ATTORNEYS' EYES ONLY" or "ATTORNEYS' EYES ONLY" (in either lower case or upper

1 case letters) to each page that contains confidential material. If only a portion or portions of the
2 material on a page qualifies for protection, the producing party also must clearly identify the
3 protected portion(s) (e.g., by making appropriate markings in the margins).

4 (b) All confidential Discovery Material in the form of software or digital
5 material stored on an electronic storage device shall be designated confidential by placing either
6 the applicable Confidentiality Designation or legend on the device itself, if possible, or by
7 designating the specific material using the applicable confidentiality designation in accompanying
8 correspondence, email, or similar transmission.
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10 (c) Testimony given in deposition or in other pretrial proceedings: the parties
11 and any participating non-parties must identify on the record, during the deposition or other pretrial
12 proceeding, all protected testimony, without prejudice to their right to so designate other testimony
13 after reviewing the transcript. Any party or non-party may, within thirty days after receiving the
14 transcript of the deposition or other pretrial proceeding, designate portions of the transcript, or
15 exhibits thereto, as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" or "Attorneys'
16 Eyes Only". If a party or non-party desires to protect confidential information at trial, the issue
17 should be addressed during the pre-trial conference.
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19 (d) Other tangible items: the producing party must affix in a prominent place
20 on the exterior of the container or containers in which the information or item is stored the the
21 applicable Confidentiality Designation. If only a portion or portions of the information or item
22 warrant protection, the producing party, to the extent practicable, shall identify the protected
23 portion(s).
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25 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
26 designate qualified information or items does not, standing alone, waive the designating party's

1 right to secure protection under this Order for such material. Upon timely correction of a
2 designation, the receiving party must make reasonable efforts to ensure that the material is treated
3 in accordance with the provisions of this Order.

4 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

5 6.1 Timing of Challenges. Any party or non-party may challenge a Confidentiality
6 Designation at any time. Unless a prompt challenge to a designating party's Confidentiality
7 Designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
8 burdens, or a significant disruption or delay of the litigation, a party does not waive its right to
9 challenge a Confidentiality Designation by electing not to mount a challenge promptly after the
10 original designation is disclosed.

12 6.2 Meet and Confer. The parties must make every attempt to resolve any dispute
13 regarding Confidentiality Designation without court involvement. Any motion regarding
14 Confidentiality Designation or for a protective order must include a certification, in the motion or
15 in a declaration or affidavit, that the movant has engaged in a good faith meet and confer
16 conference with other affected parties in an effort to resolve the dispute without court action. The
17 certification must list the date, manner, and participants to the conference. A good faith effort to
18 confer requires a face-to-face meeting or a telephone conference.

20 6.3 Judicial Intervention. If the parties cannot resolve a challenge without court
21 intervention, the designating party may file and serve a motion to retain confidentiality under Local
22 Civil Rule 7 (and in compliance with Local Civil Rule 5(g), if applicable). The burden of
23 persuasion in any such motion shall be on the designating party. Frivolous challenges, and those
24 made for an improper purpose (*e.g.*, to harass or impose unnecessary expenses and burdens on
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other parties) may expose the challenging party to sanctions. All parties shall continue to maintain the material in question as confidential until the court rules on the challenge.

7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as “Confidential” or as “Highly Confidential – Attorneys’ Eyes Only” that party must:

(a) promptly notify the designating party in writing and include a copy of the subpoena or court order;

(b) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Order. Such notification shall include a copy of this Order; and

(c) cooperate with respect to all reasonable procedures sought to be pursued by the designating party whose confidential material may be affected.

8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a receiving party learns that, by inadvertence or otherwise, it has disclosed confidential material to any person or in any circumstance not authorized under this Order, the receiving party must immediately (a) notify in writing the designating party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the protected material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this order, and (d) request that such person or persons execute the “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

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1 9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED
2 MATERIAL

3 When a producing party gives notice to receiving parties that certain inadvertently
4 produced material is subject to a claim of privilege or other protection, the obligations of the
5 receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision
6 is not intended to modify whatever procedure may be established in an e-discovery order or
7 agreement that provides for production without prior privilege review. The parties agree to the
8 entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.
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10 10. NON TERMINATION AND RETURN OF DOCUMENTS

11 Within 60 days after the termination of this action, including all appeals, each receiving
12 party must return all confidential material to the producing party, including all copies, extracts and
13 summaries thereof. Alternatively, receiving counsel may destroy all Discovery Materials
14 designated as “Confidential” and/or “Highly Confidential - Attorneys Eyes Only” and serve a
15 written certification of their destruction to counsel for the Producing Party.
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17 Notwithstanding this provision, counsel are entitled to retain one archival copy of all
18 documents filed with the court, trial, deposition, and hearing transcripts, correspondence,
19 deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work
20 product, even if such materials contain confidential material.

21 The confidentiality obligations imposed by this Order shall remain in effect until a
22 designating party agrees otherwise in writing or a court orders otherwise.
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1 IT IS SO ORDERED

2 IT IS FURTHER ORDERED that pursuant to Fed. R. Evid. 502(d), the production of any
3 documents in this proceeding shall not, for the purposes of this proceeding or any other federal or
4 state proceeding, constitute a waiver by the producing party of any privilege applicable to those
5 documents, including the attorney-client privilege, attorney work-product protection, or any other
6 privilege or protection recognized by law.
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8 DATED: March 28, 2022

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11 BRIAN A. TSUCHIDA
12 United States Magistrate Judge
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16 Respectfully Submitted,

17 By: /s/ W. Gregory Lockwood
18 W. Gregory Lockwood, WSBA No. 52232
19 wglockwood@grsm.com
20 *Attorneys for Plaintiff 3M Company*
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EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
_____ [print or type full address], declare under penalty of
perjury that I have read in its entirety and understand the Protective Order that was issued by the
United States District Court for the Western District of Washington on [date] in the case of *3M
Company v. AIME, LLC*, et al., Case No.2:20-cv-01096-TL. I agree to comply with and to be
bound by all the terms of this Protective Order and I understand and acknowledge that failure to
so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly
promise that I will not disclose in any manner any information or item that is subject to this
Protective Order to any person or entity except in strict compliance with the provisions of this
Order.

I further agree to submit to the jurisdiction of the United States District Court for the
Western District of Washington for the purpose of enforcing the terms of this Protective Order,
even if such enforcement proceedings occur after termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____